No. 91-194

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

vs.

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

NICHOLAS J. SPAETH *
Attorney General
State of North Dakota

ROBERT W. WIRTZ
JOY L. WEZELMAN
Assistant Attorneys General
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota
58505-0599
(701) 224-2770

ALAN H. FRIEDMAN
Special Assistant Attorney General
386 University Avenue
Los Altos, California 94022
(415) 941-0556

Attorneys for Respondent

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a state may, consistent with the due process clause of the fourteenth amendment and with the commerce clause, require a direct marketing company to collect and remit the state use tax?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

No. 91-194

In The

Supreme Court of the United States

October Term, 1991

QUILL CORPORATION,

Petitioner,

vs.

STATE OF NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEIDI HEITKAMP,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

North Dakota use tax law requires "every retailer maintaining a place of business in this state" to collect use tax from its customers. N.D. Cent. Code §57-40.2-07 (Supp. 1991). Prior to 1987, "retailer maintaining a place of business" was defined as a retailer maintaining a physical office or location in the state. In 1987, this definition was amended to include a retailer who regularly or systematically solicits sales in North Dakota. N.D. Cent.

Code §57-40.2-01(7) (Supp. 1991). This statutory change forms the basis for the controversy in this case.

Petitioner, Quill Corporation ("Quill"), is a national direct marketer of office supplies and equipment. Quill has several thousand North Dakota customers. Appendix to the Petition for Writ of Certiorari ("Pet. App.") A2. These customers annually purchase just under $1,000,000 worth of Quill products. *Id.* This sales volume makes Quill North Dakota's sixth largest retailer of office equipment and supplies. Pet. App. A30.

Quill sells its merchandise using state of the art marketing techniques, including a computer software program that permits Quill customers to order, check inventories, and confirm prices directly with Quill and to communicate with other Quill customers about Quill products. Pet. App. A29-A30. Quill also makes extensive use of telephone and telecommunications technology to solicit and serve its North Dakota customers, including a twenty-four hour "help line" for customers to call with questions or comments about products. Pet. App. A2, A29-A30. Quill annually sends over sixty different bulk mailings of its catalogs and flyers to North Dakota residents. These mailings total more than 230,000 separate pieces of mail, cumulatively weighing over 24 tons. Pet. App. A2-A3.

In 1989, North Dakota notified Quill that, pursuant to North Dakota use tax law, it was required to obtain a permit and remit use tax. When Quill refused, North Dakota filed a declaratory judgment action, asking the North Dakota district court to declare Quill a retailer

maintaining a place of business in North Dakota.[1] Pet. App. A4. In defense, Quill argued that the statute violates the due process and commerce clauses of the United States Constitution as interpreted in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967).

The North Dakota district court ruled the statute was unconstitutional, and the State appealed to the North Dakota Supreme Court. Pet. App. A38. On review, the court concluded that "Quill's significant presence within the State and its retained ownership of property within the State generate a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax." Pet. App. A36. Quill then petitioned this Court for review.

SUMMARY OF ARGUMENT

Certiorari may be denied in this case because the North Dakota Supreme Court did not disregard *National Bellas Hess*. The North Dakota Supreme Court considered the factual differences between National Bellas Hess and Quill, and concluded those differences supported a ruling for the State consistent with *National Bellas Hess*.

---

[1] Since North Dakota seeks only the collection of its use tax and not the collection of local use tax, Quill's suggestion that, should North Dakota prevail, direct marketers must comply with the tax requirements of "approximately 6500 jurisdictions" grossly overstates the burdens at issue in this case. Petition for Writ of Certiorari ("Pet.") at 22.

It must be conceded, however, that North Dakota's decision arguably conflicts with *National Bellas Hess* because the court found nexus based primarily on marketing activities conducted by telecommunications, mail, and common carrier, and not based on physical location in the state. Other state courts have reached contrary conclusions by reading *National Bellas Hess* more rigidly. There is, therefore, confusion as to the appropriate nexus standards applicable to direct marketers. Because of the national significance of the issue raised in this case, this Court will probably review this issue sometime in the future. North Dakota's best interests are served by an earlier, rather than later, resolution of this issue. Therefore, the State agrees that the Court should grant certiorari on the question presented as reformulated in this response.

Certiorari should be denied as to Quill's second question because the question is not properly before the Court.

ARGUMENT

The facts of this case are distinguishable from those in *National Bellas Hess*. *National Bellas Hess* involved a direct mail marketer whose contacts with the market state were limited to two bulk mailings of catalogs, accompanied by sporadic mailings of flyers, followed by delivery of the goods by U.S. mail and common carrier. The Court in *National Bellas Hess* found that, given the potential burden on interstate commerce, these contacts were

not sufficient to require that National Bellas Hess collect Illinois use tax.

The North Dakota Supreme Court applied the *National Bellas Hess* decision to the present facts, taking into account the revolution in marketing and technology that has occurred since 1967. The court stated:

> We . . . are instructed to be cognizant of the vast differences between the mail order of the 1960's and the direct marketing of the 1990's when applying *Bellas Hess* in this case. In addition, the *Bellas Hess* majority specifically characterized the transactions there as being carried out only by mail or common carrier. Very little of the direct marketing of today is limited to mail or common carrier, and the facts of this case clearly demonstrate that Quill's business extended far beyond those limited circumstances.

Pet. App. A22.

As noted by the North Dakota Supreme Court, Quill's contacts with its North Dakota customers well exceeded those found in *National Bellas Hess*. On this ground alone, the Court appropriately could deny the Petition for Writ of Certiorari.

North Dakota recognizes, however, that special and important reasons may exist for this Court to grant the petition under Supreme Court Rule 10.1(b) and 10.1(c).

CONSIDERATIONS UNDER SUPREME COURT RULE 10.1(b)

The opinion below conflicts with recent decisions in Connecticut and Pennsylvania. In *SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 585 A.2d 666, *cert. denied sub nom. Comm'r of Revenue v. SFA Folio Collections, Inc.*, 111 S. Ct. 2839 (1991), the Connecticut Supreme Court strictly construed *National Bellas Hess* as requiring that a mail order business have some *physical connection* with the market state before the market state can impose its use tax collection duty consistent with the due process clause of the United States Constitution. *See also Cally Curtis Co. v. Groppo*, 214 Conn. 292, 572 A.2d 302, *cert. denied sub nom. Comm'r of Revenue v. Cally Curtis Co.*, 111 S. Ct. 77 (1990); *Bloomingdale's By Mail, Ltd. v. Commonwealth*, 567 A.2d 773 (Pa. Commw. Ct. 1989), *aff'd per curiam*, 591 A.2d 1047 (Pa. 1991).

In contrast to *SFA Folio*, *Cally Curtis*, and *Bloomingdale's By Mail, Ltd.*, the North Dakota Supreme Court recognized that a direct marketer's activities may create a sufficient "presence" within a state so as to support a constitutional use tax collection duty, even though that presence may not be the traditional "physical" presence.

If review is not granted in this case, the conflicting state standards and resulting confusion of the state tax administrators and direct marketers alike will only intensify. Because of the revolution in modern-day direct marketing methods, more than thirty states have amended their nexus statutes for use tax collection purposes to

include direct marketers.[2] Many of these statutes seek to impose a collection duty if the direct marketer maintains either a traditional "physical presence" within the state or, absent such physical presence, the marketer regularly or systematically solicits sales of goods to state residents. The enforcement of these newly adopted statutes will spawn additional litigation until this Court settles the issue presented by these statutes – the extent to which *National Bellas Hess* is applicable to modern marketing methods.[3]

---

[2] Petitions for writs of certiorari have been granted where, as in this case, several states have adopted new legislation in an effort to impose use tax collection requirements on mail order businesses. *See New York v. Ferber*, 458 U.S. 747 (1982) (review granted on certiorari where lower court ruling brought into question constitutionality of child pornography statute where the federal government and 47 states had adopted statutes addressing the area); *see also New York v. O'Neill*, 359 U.S. 1 (1959) (review granted on constitutionality of Uniform Law to Secure Attendance for Witnesses from Within and Without a State in Criminal Proceedings that had been adopted by 42 states).

[3] *See, e.g., Direct Marketing Ass'n v. Bennett*, No. Civ. 8-88-1067 (E.D. Cal. June 28, 1991); *Bloomingdale's By Mail, Ltd. v. Huddleston*, No. 89-3017-II (Davidson County Ch. Ct., Tenn. March 8, 1991), *appeal docketed*, No. 01-S-01-9106-CH00047 (Tenn. Sup. Ct. 1991); *SFA Folio Collections, Inc. v. Huddleston*, No. 89-3015-III (Davidson County Ch. Ct., Tenn. March 11, 1991).

CONSIDERATIONS UNDER SUPREME COURT RULE 10.1(c)

The North Dakota Supreme Court also decided an important question of federal law – whether a direct marketer can be constitutionally "present" in the market state without being "physically" present in the state.

The North Dakota Supreme Court opinion describes the need for a nexus test that is not based solely upon physical presence, but looks at the economic realities of the relationships between the direct marketer and the market state. The shorthand reference to this additional basis for finding nexus is the "economic presence" standard. Under the economic presence standard, constitutional nexus exists when a direct marketer, that is not physically present within a state, regularly or systematically solicits the state's consumer market by any means and, as a result, realizes an economic gain.

This Court has not ruled directly on this issue. However, in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988), the Court recognized the existence of "economic presence" in relationship to a direct marketer's duty to pay a use tax on advertising materials sent into a state. In upholding the duty to pay the tax, this Court noted "Holmes' significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." *Id.* at 33; *cf. Goldberg v. Sweet*, 488 U.S. 252, 266-67 (1989) (addressing, in dicta, that issue).

It is likely that the direct marketing nexus issue will continue to be fought out in the states until this Court reviews an appropriate case. On the one hand, the state

tax administrators, including North Dakota's, are compelled to enforce statutes that are presumptively valid under state law. If these statutes or their application are found to be constitutionally infirm, those tax administrators face actions under 42 U.S.C. §1983 and 42 U.S.C. §1988.[4] Also, to the extent that states have obtained compliance with new nexus statutes, the states will encounter potential retroactive refund claims, which could have a large impact on states' treasuries. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991); *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

At the same time many direct marketers, assuming that *National Bellas Hess* protects their activities, refuse to collect use taxes as required by newly adopted nexus statutes. If, at a later time, this Court finds these nexus statutes constitutional, direct marketers may find it difficult to pay the delinquent use tax liabilities and to recoup the tax from past customers.

The State of North Dakota now has a nexus statute that has been upheld by its supreme court. Under most circumstances, the State would oppose a petition for certiorari seeking review of the North Dakota Supreme Court's decision. The State recognizes, however, that the

---

[4] Imposition of such potential liabilities is no longer a theoretical threat. *See Dennis v. Higgins*, 111 S. Ct. 865 (1991); *see also Swanson v. Powers*, No. 90-1110 (4th Cir. June 25, 1991) (initially holding the North Carolina Tax Commissioner individually liable for $140,000,000 for collecting taxes later held invalid in *Davis v. Michigan*, 489 U.S. 803 (1989)).

issue raised in this case has nationwide significance and will continue to be litigated in other states. Thus, even if certiorari is denied in this case, the Court is likely to grant certiorari in a similar case sometime in the future. If the Court were to conclude that a nexus statute like North Dakota's is unconstitutional, the State would encounter potentially large retroactive refund claims. *See, e.g., James B. Beam Distilling Co.; McKesson Corp.; Davis v. Michigan.* An early resolution of this issue will enable state tax administrators to properly enforce their state tax laws.

QUILL'S SECOND QUESTION PRESENTED, REGARDING RETROACTIVITY, RAISES AN ISSUE NOT PROPERLY BEFORE THE COURT

The North Dakota Supreme Court held that North Dakota's use tax nexus statute as applied to Quill is constitutional. Application of that decision to the effective date of the statute is not "retroactive." The statute was amended, approved, and filed on March 16, 1987, and became effective for all transactions occurring on or after July 1, 1987. 1987 N.D. Laws ch. 704. The legislation only seeks a prospective application of a statutory change.

Since Quill has not collected or remitted any state use taxes, this particular case does not present the issue of unconstitutionally collected taxes. Thus, it is difficult to imagine the circumstances under which retroactive application could be an issue. However, if it could, the state court must first be allowed to rule on the question. *See*

McKesson Corp., 110 S. Ct. at 2258 ("[t]he State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.").

Nevertheless, the retroactivity issue presented to this Court by Quill was not raised, argued, briefed, or decided below. By not specifying the stage in the proceedings at which the issue was raised and by not quoting portions of the record where the issue appears, Quill has failed to comply with Supreme Court Rule 14.1(h). Quill cannot comply with Rule 14.1(h) because there are no references to this issue in the record.

For these reasons, Quill's second question presented is not properly before this Court.

CONCLUSION

While it is unusual for the winning party to agree that granting a writ of certiorari is appropriate, the State of North Dakota believes that early resolution by this Court of the issue presented in the petition, as restated in this response, is in the State's best interests. North Dakota, therefore, respectfully requests that the Court grant certiorari on the first question presented as reformulated in this response and deny certiorari on Quill's second question presented.

Dated: September 3, 1991.

Respectfully submitted,

NICHOLAS J. SPAETH *
Attorney General
State of North Dakota

ROBERT W. WIRTZ
JOY L. WEZELMAN
Assistant Attorneys General
State Capitol
600 East Boulevard Avenue
Bismarck, North Dakota
58505-0599
(701) 224-2770

ALAN H. FRIEDMAN
Special Assistant Attorney General
386 University Avenue
Los Altos, California 94022
(415) 941-0556

Attorneys for Respondent

* Counsel of Record